Goya Foods of Florida *and* UNITE HERE, CLC.[1]
Cases 12–CA–21464 and 12–CA–21659

September 28, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On July 2, 2004, Administrative Law Judge Raymond P. Green issued the attached decision. Thereafter, the Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

I. INTRODUCTION

This case involves complaint allegations that unilateral actions taken by the Respondent in April and May 2001 violated Section 8(a)(5) and (1) of the Act. We reverse the judge and find that the Respondent violated Section 8(a)(5) when it implemented new inspection procedures for bargaining unit drivers returning from their delivery routes with refused merchandise. We affirm his finding that the Respondent violated Section 8(a)(5) by unilaterally changing drivers' routes, wages, and working conditions when it implemented a new software routing program, but we disagree with the judge that there is no need to provide a backpay remedy for this violation. Finally, we reverse the judge and find that the Respondent violated Section 8(a)(5) when it unilaterally reassigned stores from the route of a discharged driver to other drivers in the bargaining unit. Our rationale for disposition of each issue is set forth in full below.

II. THE RESPONDENT'S WITHDRAWAL-OF-RECOGNITION DEFENSE

The Respondent is a Miami-based wholesaler of Hispanic food products. It delivers these products to customers throughout South Florida, in most instances going directly to customers' individual stores instead of to their warehouses. The Respondent's work force includes employee drivers, contract drivers (agency drivers), warehouse employees, and sales employees. On October 26, 1998, the Union was certified to represent a warehouse and drivers unit, excluding contract drivers. On December 4, 1998, the Union was certified to represent a unit of sales and merchandising employees. Just over a year later, the Respondent withdrew recognition of the Union as the exclusive bargaining representative for both units.

The Respondent's exceptions rely on the withdrawal of recognition as a common defense to all allegations of 8(a)(5) violations in this case. The Respondent contends that it lawfully withdrew recognition from the Union prior to making any of the contested unilateral changes. The parties here litigated the legality of the Respondent's withdrawal of recognition in an earlier proceeding that was pending before the Board when the judge issued his decision in this case. Subsequently, the Board affirmed the finding of the judge in the prior case that the Respondent's withdrawal of recognition was unlawful, and it ordered the Respondent to recognize and bargain with the Union as the continuing bargaining representative of employees in both bargaining units. *Goya Foods of Florida*, 347 NLRB 1118 (2006) (*Goya I*).[3] In light of *Goya I*, we reject the Respondent's contention that it had no statutory obligation to bargain with the Union when it made the unilateral changes at issue here.[4]

[1] We have amended the caption to reflect the merger of the Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE!) with the Hotel Employees and Restaurant Employees International Union, AFL–CIO, CLC (HERE), effective July 8, 2004, and the disaffiliation of UNITE HERE from the AFL–CIO effective September 14, 2005.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] By mutual agreement of the parties, Judge Green deferred his decision in this case for more than 2 years awaiting Board action in *Goya I*. He then inquired whether the parties wanted to wait any longer. The Respondent did. The General Counsel did not. We find no merit in the Respondent's contention in exceptions that the judge erred by thereafter issuing a decision before the Board issued a decision in *Goya I*. The Respondent has failed to show that the judge's action was contrary to precedent, an abuse of discretion, or prejudicial to its other defenses.

[4] Also see *Goya Foods of Florida,* 350 NLRB 939, 939 (2007) (*Goya II*), where the Board, in affirming additional unilateral change findings by the judge there, relied on its *Goya I* finding of unlawful withdrawal of recognition. We note that, as in *Goya II*, the Respondent here, relying on *Peyton Packing,* 129 NLRB 1358 (1961), and *Jefferson Chemical*, 200 NLRB 992 (1972), contends that the General Counsel has abused his prosecutorial discretion by engaging in impermissible relitigation or piecemeal litigation of various unilateral change allegations in these cases. For the reasons stated by the judge and affirmed by the Board in *Goya II*, we find no merit in this contention. *Goya II*, supra, slip op. at 1 fn. 4, 3. See *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 774–777 (1997) (explaining that the General Counsel has "broad discretion" in deciding whether to consolidate cases except in circumstances where he impermissibly attempts to litigate twice the same act or conduct as a violation of different sections of the Act or he relitigates the same charges in different cases). Although several of the unilateral-change allegations in *Goya I, Goya II,* and *Goya III* involve similar employer actions, and the Respondent raises common defenses to all, the General Counsel has reasonably treated each unilateral change as a discrete event. Further, the com-

III. NEW INSPECTION PROCEDURE FOR RETURNED GOODS

Drivers generally began their delivery routes early in the morning and returned to the Respondent's facility by midmorning to early afternoon. They received a document variously referred to as a "trip front sheet" or "trip ticket," which summarized the items for delivery that day (which, in turn, were broken down customer by customer in invoices attached to the trip ticket). On the first page of the trip ticket appeared the following declaration: "WE ACCEPT FULL RESPONSIBILITY FOR THE TRUCK (TRACTOR AND TRAILER) AND ITS ENTIRE CONTENTS. WE FURTHER DECLARE THIS RESPONSIBILITY TO EXIST UNTIL ALL EQUIPMENT, MONIES, AND UNDELIVERED CONTENTS HAVE BEEN RETURNED TO GOYA FOODS, INC. PROPERTY."

At times, drivers brought two types of returned goods—credited and refused—back to the Respondent's warehouse. Credited goods were goods that previously had been delivered to a customer, and their return was preapproved by the Respondent. These goods usually consisted of individual damaged items. If credited goods were to be picked up, the driver, before leaving to make deliveries, would receive a credit memo describing the goods to be returned. Refused goods were goods that were not successfully delivered for one reason or another, e.g., the goods were not ordered or the store was closed. Unlike individual credited goods, refused goods would more often be returned in bulk, i.e., all items of a particular product or products. The driver would note the refusal on his trip ticket.

On any day, a driver could return with both types of returned goods, just one type, or neither. Respondent's president, Robert Unanue, estimated that the frequency of credit returns was "very high" and that of refused-goods returns was "lower, perhaps about a third of trips." Driver Rodolfo Chavez estimated he had credit returns two to three times a week. His estimate of refused-goods returns varied from four to five times a month to two to three times a week.

Prior to April 2, 2001,[5] credited goods were offloaded and accounted for at a location known as the credit tent. For refused goods, the driver simply parked his truck at the loading dock and left the goods on the truck to be accounted for and offloaded by warehouse employees later in the evening. Paperwork—trip tickets, invoices, and credit memos—was given to clericals. Drivers were not required to sign any document at the warehouse acknowledging credited or refused goods.

On April 2, the Respondent unilaterally implemented a new inspection procedure after it became aware that refused goods were being stolen. (One agency driver had been arrested for his admitted theft.) Under the new procedure, the Respondent required drivers with refused goods to go to the credit tent, where a unit employee physically inspected the inside of the truck and counted the refused merchandise to make sure that count matched what was listed on the trip ticket. For 2 weeks, the Respondent assigned an additional warehouse unit employee, Gilberto Torres, to perform inspections. Thereafter, Diaz de Villegas, the warehouse employee already assigned to handle credited goods, also inspected refused goods. Unlike credited goods, nonrefrigerated refused goods were not offloaded,[6] but all items were counted in the truck and the inspecting employee would note them on the trip ticket. In addition, the driver bringing back the refused goods was required to sign the trip ticket in the presence of the credit-tent inspector to verify that the list of refused goods was accurate. On April 3, driver Chavez refused to sign the trip ticket. He was discharged for insubordination the next day.[7]

Although the evidence is in conflict with respect to whether the Respondent's new inspection procedure lengthened drivers' workdays, the judge found that the inspection procedure represented a de minimis change because it only occasionally required drivers to spend "a few more minutes" at the credit tent. Implicitly crediting Unanue's testimony, the judge noted that whereas the return of credited goods was a normal occurrence, the return of refused goods was "a great deal more infrequent." He therefore recommended dismissal of the 8(a)(5) unilateral-change allegation concerning the inspection procedure.

In exceptions, the General Counsel contends that the judge erred in failing to find that the new inspection procedure entailed a substantial and material change and was therefore a mandatory bargaining subject. We agree with the General Counsel's contention. The judge failed to consider the significance of the new requirement that

plaint in the present case focuses on a group of intertwined, close-in-time events involving the implementation of the "refused" goods inspection procedure and the Roadnet route-mapping software program (both of which are explained below). See *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 347 fn. 1 (2000) (agreeing with the judge's statement that "*Jefferson Chemical* is not meant to apply . . . where a respondent is involv[ed in] litigation spanning several years and the General Counsel pursues the litigation in reasonable, self-contained segments").

[5] All subsequent dates are in 2001, unless otherwise indicated.

[6] The judge erred in stating that drivers were required to offload refused goods at the credit tent. Only refused refrigerated goods were offloaded after verification. Other verified refused goods remained on the truck until removed by warehouse employees later in the evening.

[7] The complaint alleged that Chavez' discharge violated Sec. 8(a)(3) and (5). On February 12, 2004, the judge approved a non-Board settlement of these allegations.

drivers sign the trip ticket to verify the accuracy of the refused-goods inspection. By imposing this requirement, the Respondent formalized driver responsibility and created the potential for discipline if a driver failed to follow the new procedure. In fact, Chavez' discharge for insubordination was based on his failure to comply with this procedure. Notwithstanding the preexisting statement of responsibility on the trip ticket (quoted above), drivers were not previously required to sign any paper attesting to what was in the truck when they returned from their route. With the new procedure, they were required to sign *and* were subject to discharge if they did not do so. The signature requirement signaled a substantial and material change in drivers' working conditions. The Respondent therefore had an obligation to bargain with the Union prior to imposing the new inspection procedure. See, e.g., *Ferguson Enterprises*, 349 NLRB 617 (2007), where the Board held that the respondent violated Section 8(a)(5) by imposing a new truck key policy based "on the undisputed evidence that an employee was disciplined for failing to comply with that policy." Id., slip op. at 2. Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with notice and an opportunity to bargain prior to implementing the new inspection procedure for returned goods.

IV. IMPLEMENTATION OF THE ROADNET SOFTWARE ROUTING SYSTEM

At relevant times, the Respondent had about 13 bargaining unit drivers. As stated above, it also used a number of temporary agency drivers daily as needed. Unit drivers received a wage based on an 8-hour day/40-hour week, regardless of hours actually worked, and a commission based on a percentage of the total value of delivered goods. The more products a driver could deliver and the more efficiently the driver could complete a delivery route, the greater was his ability to earn commissions and to work fewer hours. This compensation procedure made certain store assignments more valuable than others, from the drivers' point of view.

There was conflicting testimony about whether the unit drivers had regular delivery routes. President Unanue repeatedly testified that the number of stores serviced by a driver varied daily; he denied that drivers had fixed routes. He emphasized that the Respondent was constantly adding and subtracting customer stores throughout its vast South Florida market. He also maintained that the Respondent had unlimited managerial discretion over how and to whom it assigned stores for daily delivery. On the other hand, drivers Chavez, Then, and Navarro testified that, although they did not deliver to the same stores every day, for long periods of time they delivered to stores within a consistent, defined geographic area and repeatedly serviced most of the same stores in the course of a regular weekly or biweekly schedule.

Until 2001, the exact nature of a driver's daily delivery schedule was determined by nonunit trip planners based on a number of variables, including times when a customer would accept products, the amount of goods ordered, available trucks and drivers, and distances between stores. In August 1998, before the Union's election campaign and certification, the Respondent contracted to use, at all of its locations, a software routing program called Roadnet, with the intention of performing more efficiently and expeditiously the function previously performed on a "pencil and paper" basis by trip planners. The Roadnet program was implemented for the Miami location in May 2001. The new program resulted in some reassignment of stores among unit drivers. More significantly, a number of stores previously serviced by temporary agency drivers were now assigned to unit drivers. After Roadnet's implementation, the commissions earned by all but one driver increased, but so did the amount of time each driver spent on the road each day.

Preliminarily, the judge rejected the notion that unit drivers had "some kind of quasi-equitable interest in the routes" they serviced. He stated that "[w]hile it is certainly true that routes tended to become somewhat 'fixed' because of custom and usage, changes did occur from time to time as old drivers left, new drivers were hired, or as customers either came or left or changed their patterns of ordering." Regardless of these fluctuations in routes, however, the judge recognized that the commission-based income of the drivers was directly tied to the amount of deliveries they were assigned to make each day. Contrary to the Respondent, he found that the implementation of Roadnet involved something more than substituting one routing tool for another. It produced substantial changes in drivers' income and hours worked. He further noted that it was immaterial that the income change was for the better because the Act still requires bargaining about the mandatory subject of wages. The judge therefore concluded that the Respondent violated Section 8(a)(5) by unilaterally changing drivers' routes and thereby changing their hours and wages.

In exceptions, the Respondent contends that: (1) there was no change in routing method because Roadnet was simply a different tool using the same variables used by trip planners to determine daily store delivery assignments; (2) there was no unilateral change in drivers' routes because both before and after the implementation of Roadnet, daily store delivery schedules were in a constant state of dynamic flux and always subject to absolute

managerial discretionary control; (3) the Respondent's bargaining obligation, if any, was limited to the effects of Roadnet's implementation inasmuch as the decision to use Roadnet systemwide was made prior to the Union's advent.

We agree with the judge that the implementation of Roadnet involved more than the substitution of one routing tool for another. Roadnet did not simply perform the same routing task faster than the trip planners used to do; it produced different results, with substantial and material effects on unit drivers' routes, income, and hours, all of which are mandatory bargaining subjects. We find no merit in the Respondent's argument that there was no unilateral change because it continued to follow a pattern of daily discretionary variation in drivers' delivery assignments. In this respect, the judge understated the defined nature of most unit drivers' routes. The record in *Goya I* and *II* is consistent with drivers' testimony in this case that although their daily delivery schedules varied, they regularly and repeatedly serviced many of the same stores in a particular geographic area for long periods of time, years in some cases. Furthermore, in both *Goya I* and *II*, the Board rejected the same purported past practice defense raised by the Respondent here. The Board found that the Respondent relied on "an asserted historic right to act unilaterally, as distinct from an established past practice of doing so. . . . [T]hat right to exercise sole discretion changed once the Union became the certified representative." *Goya I*, 347 NLRB 1118, 1120 (2006). Consequently, we find no merit in the Respondent's defense that any changes in store and route assignments resulting from Roadnet's implementation were consistent with maintenance of an alleged dynamic status quo.

Although not determinative of whether the Respondent's unilateral action in this regard was unlawful, we do find merit in its contention that it had no obligation to bargain about the *decision* to use Roadnet. That decision was clearly made before the Board election and the Union's certification. However, the Respondent did have the obligation to bargain about the discretionary effects of its implementation of Roadnet on unit drivers, i.e., the changes in their routes, wages, and hours. With the number of routing variables involved, there is no showing that Roadnet would inevitably produce only a single result for each driver as to these mandatory subjects of bargaining. Compare *Fresno Bee*, 339 NLRB 1214, 1214–1215 (2003) (finding that respondent unlawfully failed to bargain about changes in lunch period and shift scheduling resulting from preelection decision to implement PeopleSoft, a computerized employee benefits system). On this basis, we affirm the judge's finding that the Respondent violated Section 8(a)(5) of the Act when it failed to provide prior notice to the Union and an opportunity to bargain about the effects of its implementation of the Roadnet program.

V. REASSIGNMENT OF DISCHARGED DRIVER CHAVEZ' STORES

As mentioned above, driver Chavez was discharged on April 4. After Chavez' discharge, the Respondent distributed the stores customarily on his route to a number of different drivers. The dispersal of Chavez' route differs from unlawful unilateral changes made in *Goya I*, where on five occasions the Respondent reassigned the *entire* routes of drivers who were terminated or went "on leave." 347 NLRB at 1120–1121, 1138. In addition, drivers Chavez and Then testified in this case that they had successfully requested reassignment to an entire route vacated when another driver left the Respondent.

The judge summarily rejected the General Counsel's argument that the Respondent violated Section 8(a)(5) by reassigning the stores on Chavez' route. He reasoned that when a company fires an employee, "it has to either hire someone else or reassign his or her work to the remaining employees on the staff. This does not, to my mind, constitute a unilateral change but simply a continuation of the normal course of doing business, inherent to any enterprise."

Excepting, the General Counsel argues that the Respondent had a past practice of reassigning entire routes and that it unlawfully failed to bargain before unilaterally dismantling Chavez' route and assigning his stores piecemeal. The Respondent counters with the defense it has made for all alleged unilateral changes in route and store assignments, i.e., that there were no fixed routes, delivery schedules varied considerably, and it has a past practice of exercising total discretion in making daily assignments.

The judge's recommendation to dismiss the allegation relating to reassignment of Chavez' stores is based on a mischaracterization of the issue presented. Contrary to the judge, the issue is not whether the Respondent could temporarily reassign the stores as an expedient to meet delivery demands on a short-term basis. The record indicates that the Respondent has used temporary assignments to unit or agency drivers to cover short-term absences. The issue here involves permanent or long-term reassignment of Chavez' stores. Although the Respondent split up the stores on Chavez' route among several drivers, its obligation to bargain is not materially different from its bargaining obligation concerning the reassignment of entire routes of the five drivers in *Goya I*. As previously discussed, any single store assignment has direct income consequences for unit drivers on commission. As such, the assignment is a mandatory subject of

bargaining, and the Respondent's purported past practice defense of its failure to bargain is without merit. We therefore need not pass on whether the General Counsel is correct that the dismantling of Chavez' route also represented a departure from a past practice of only reassigning entire routes. We conclude in any event that the Respondent violated Section 8(a)(5) of the Act by unilaterally reassigning Chavez' stores.

AMENDED REMEDY

Having found that the Respondent unlawfully implemented a new returned-goods inspection procedure, we shall order it to rescind that procedure, upon the Union's request, and to provide the Union notice and opportunity to bargain prior to implementing any such procedure in the future or any other changes in wages, hours, or other terms and conditions of employment.[8]

The judge declined to recommend any backpay remedy for the changes resulting from the Respondent's implementation of Roadnet because the evidence did not show any economic detriment to bargaining unit drivers as a result of the changes. We disagree with the judge on this point. There was no requirement that the General Counsel demonstrate monetary losses in the initial "merits" phase of this litigation. Furthermore, the fact that drivers earned the same or more after Roadnet's implementation is not necessarily dispositive of the remedial issue, particularly in light of the additional hours worked. The relevant issue, to be decided in compliance proceedings, is what any individual driver would have earned under the preexisting route and assignment system. Accordingly, we shall order the Respondent to make its drivers whole for any losses resulting from implementation of Roadnet.[9] Any backpay due shall be determined in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[8] We have also found that the Respondent violated Sec. 8(a)(5) by unilaterally reassigning the stores on discharged driver Chavez' route. The usual remedy for an unlawful unilateral change includes ordering the change rescinded. That is, the status quo ante is to be restored. Here, however, such a remedy is not practicable. As noted above, the parties settled allegations that driver Chavez' discharge violated Sec. 8(a)(3) and (5), but Chavez was not reinstated as a result of that settlement. In these circumstances, we will leave the further disposition of Chavez' former stores to bargaining.

[9] Accord: *Goya II*, supra, slip op. at 6–7, providing for backpay to drivers who were reassigned from regular routes in 2002, notwithstanding Respondent's evidence that their earnings increased. Inasmuch as we find that the Respondent had no obligation to bargain with the Union about its preelection decision to implement Roadnet, we agree with the judge that the Respondent should not be ordered to rescind its use of that program.

ORDER

The National Labor Relations Board orders that the Respondent, Goya Foods of Florida, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union by unilaterally changing inspection procedures for refused goods and bargaining unit drivers' routes, wages, and hours of work resulting from implementation of the Roadnet software program, and by unilaterally reassigning stores from the route of a discharged driver.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On the Union's request, rescind the returned-goods inspection procedure that was unilaterally imposed for bargaining unit drivers.

(b) Notify and, on request, bargain with the Union before making any changes in wages, hours, or other terms and conditions of employment of bargaining-unit drivers.

(c) Make whole the bargaining unit drivers for any loss of wages or other benefits they may have suffered as a result of the Respondent's implementation of the Roadnet software program, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Miami, Florida facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 2, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with UNITE HERE, CLC as your exclusive collective-bargaining representative in the warehouse employees and drivers unit by unilaterally changing inspection procedures for refused goods, by unilaterally changing drivers' routes, wages, and hours of work when implementing the Roadnet software program, and by unilaterally reassigning stores from the route of a discharged driver.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on the Union's request, rescind the returned-goods inspection procedure that was unilaterally imposed for bargaining unit drivers.

WE WILL notify and, on request, bargain with the Union before making any changes in your wages, hours, or other terms and conditions of employment.

WE WILL make whole our bargaining unit drivers, with interest, for any loss of wages or other benefits they may have suffered as a result of our unilateral implementation of the Roadnet software program.

GOYA FOODS OF FLORIDA

Marcia Valenzuela, Esq. and *Jennifer Burgess-Solomon, Esq.,* for the General Counsel.

James C. Crosland, Esq. and *David C. Miller, Esq*., for the Respondent.

Ira J. Katz Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this matter[1] on November 8, 9, and 13, 2001. The charges and amended charges were filed on April 9 and 27, May 30, July 11, and August 31, 2001. The consolidated complaint was issued on September 25, 2001. In substance, the complaint alleges as follows:

1. That the Union was certified in Case 12–RC–8266 on October 26, 1998, as the collective-bargaining representative of the employees in the following described unit. (The petition in that case was filed on September 2, 1998.)

> All full-time and regular part-time drivers, forklift operators, production, maintenance and warehouse employees, employed by the Employer at its facility located at 1900 NW 92 Avenue, Miami, Florida 33172; excluding all other employees, employees employed by outside agencies and other contractors, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

2. That on or about April 2, 2001, the Respondent unilaterally changed employee terms and conditions of employment by requiring all drivers to submit to new inspection procedures upon completion of their routes, including the signing of a document acknowledging the quantity of returned merchandise in their vehicles.

3. That in or about May 2001, the Respondent unilaterally changed employee terms and conditions of employment by instituting a change in the assignment of routes to employees.

4. That on or about April 4, 2001, the Respondent for discriminatory reasons discharged Rodolfo Chavez.

Thereafter, on February 12, 2004, I issued an Order approving the withdrawal of certain allegations contained in Case 12–CA–21464 because the parties had entered into a non-Board settlement agreement. The withdrawn allegation related to the discharge of Rodolfo Chavez.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the briefs filed, I make the following findings and conclusions.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] Certain errors in the transcript have been noted and corrected.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent markets prepared foods primarily for the Hispanic market in the United States and abroad. It is an integrated enterprise, making the cans it uses, preparing the foods it sells, and delivering these to markets ranging in size from small grocery stores to large supermarkets.

The Union began its organizing efforts at Goya in 1998 and this ultimately led to the Union's certification by the Board after an election held on October 26, 1998.

After a period of bargaining, the Respondent withdrew recognition on December 20, 1999.

At some point, the Union filed a series of charges against the Company. These charges resulted in a complaint, which was heard by Administrative Law Judge Lawrence W. Cullen in June 2000. The lead case number of that matter is Case 12–CA–19668, and Judge Cullen issued his decision and recommended Order on February 21, 2000. That decision, which held, inter alia, that the Company had unlawfully withdrawn recognition, was appealed to the Board.

At the time of this hearing, the parties agreed that I should defer a decision in this case until the Board issued a decision in the Cullen case. But after waiting for almost 3 years, it occurred to me that perhaps the parties might have changed their minds. As it turns out, the Respondent still wants me to wait, whereas the General Counsel wants me to issue a decision. Obviously, I have decided to agree with the General Counsel.

B. Alleged Unilateral Change Regarding Return Inspections

The General Counsel and the Union contend that this change affected the employees' terms and conditions of employment were not minimal and therefore required the Company to give notice to and bargain with the Union before making the change. The Company contends that the change was de minimus and that it was enacted without consultation with the Union because of exigent circumstances.

Goya delivers its merchandise to stores and supermarkets utilizing 28-, 40-, and 45-foot tractor-trailers driven either by its own drivers or contract drivers. The direct drivers are employees encompassed by the certified collective-bargaining unit whereas the contract drivers, who the parties have considered to be independent contractors, were excluded from the bargaining unit.

Each truck has either a freezer or a separate refrigerator compartment for frozen goods.

Deliveries are made directly to individual stores and supermarkets as opposed to a system of delivery to supermarket central warehouses. This system (direct store delivery or D.S.D.), has the advantage of targeting individual stores (and their local customers), and therefore, the Respondent has been able to sell a wider variety of goods than otherwise might be the case. On the other hand, the disadvantage of this system is that it is more labor intensive and requires more drivers. The Respondent has determined that the advantages outweigh the disadvantages.

Drivers typically deliver merchandise to a number of customers during a single trip per day. When they return to Goya's facility, drivers may come back with two types of merchandise; "credited merchandise" or "refused merchandise." Credited merchandise is goods that had previously been delivered to a store and their return to Goya has been preapproved. In such cases, the driver, before leaving Goya to make deliveries, is issued a credit memo describing the goods to be returned. On a driver's return to the Respondent's facility, credited merchandise is offloaded and accounted for at a location within the facility known as the credit tent.

Returned merchandise involves goods that are refused by a store for one reason or another. (They can be damaged goods or goods that have not been ordered.) Prior to April 2, the drivers returned with these kinds of goods at the end of the day, but they were left on the truck after it was parked and the goods were not accounted for until later in the evening after the driver usually went home. They were not accounted for at the credit tent and there was a hiatus between the time the truck entered the facility and the time the returned goods were accounted for.

In early 2001, a theft problem arose involving returned merchandise. That is, it became apparent to the Company that some of the goods that were supposed to be returned to the warehouse (as returned merchandise) never showed up when the accounting procedure took place in the evening. This was brought to the attention of the police who conducted an investigation and this ultimately resulted in the arrest of a contract driver who confessed that he appropriated to himself, returned merchandise.

The Company's witnesses testified that in order to prevent these kind of thefts in the future, they decided to slightly alter the return procedure so that both credited merchandise and return merchandise would be offloaded and accounted for at the time that the truckdriver returned from his route. This change involved having a person assigned to the credit tent who would, in addition to dealing with the credited merchandise, physically inspect the inside of the truck, including the freezer compartment, to verify what if any returned merchandise was being brought back to the warehouse.

Company witnesses acknowledges that it did not notify the Union about this change in procedure and state that one reason was that they wanted to see if they could catch any other drivers who might be stealing goods. (They didn't.) In any event, the procedure went into effect on April 2, 2001, and a warehouse employee named Torres was assigned to be at the credit tent during the period when trucks returned.

The only real difference between the return procedure before and after April 2, insofar as the drivers were concerned, is that upon their return to the terminal, they were required to spend a few more minutes at the credit tent while Torres inspected the inside of the trucks and counted the returned merchandise. Other than that, there was no other change in procedure and the change, in my opinion, was de minimus. *Civil Service Employees Assn.*, 311 NLRB 6 (1993). (I note that the return of credited merchandise is a normal occurrence, whereas the return of "return" merchandise is a great deal more infrequent.)

C. Alleged Unilateral Change in Routes

The Company delivers its products to supermarkets and smaller markets from its Miami facility throughout the greater Miami area.

The geographic area serviced by Goya's drivers runs about 300 miles from north to south and about 100 miles from east to west.

To make deliveries, the Company employs a group of drivers whom it directly employs. The Company also utilizes the services of another group of drivers who are designated as agency drivers. This latter group was not included in the collective-bargaining unit and were considered by the Company and the Union to be independent contractors.

The routing of deliveries is akin to the traveling salesman problem in mathematics. That is, how do you design the shortest or fastest routes given the multiplicity of variables that go into this problem? To solve the problem, one must consider the number of drivers available on any given day, the number of customers to which deliveries must be made on that day, the periods of time that particular customers will accept deliveries,[2] the amount of goods to be delivered to each customer on any particular day and the distance, or more importantly given traffic conditions, the time that drivers normally take to go from one location to the next.

The General Counsel asserts that the employee drivers prior to the May 2001 had fixed routes. The implication here is that each driver had some kind of quasi-equitable interest in the routes. But this I think is not the case. While it is certainly true that routes tended to become somewhat "fixed" because of custom and usage, changes did occur from time to time as old drivers left, new drivers were hired, or as customers either came or left or changed their patterns of ordering.

Before May 2001, the function of figuring out each day's deliveries was accomplished by trip planners who worked in the traffic department. These people, using their knowledge of where the stores were located and the deliveries scheduled, made decisions each night as to where, when and by whom the deliveries were to made on the following day. Of course, there was a historically established pattern for the trips so that the trip planners did not have to reinvent the wheel each night. But they did have to deal with changes that came up in the normal course of events, such as drivers being out sick, etc.

In or about 1990, the Company began to explore the possibility of using a software program called "Roadnet" to assist in the making of routes. This is a program sold by a division or subsidiary of UPS and was utilized at a small number of the Company's locations in 1992. At that time, the program was not so sophisticated and it is not clear to me how much success the Company had with its use at that time.

In any event, in 1998, and before the Union arrived on the scene, the Company entered into a contract to license Roadnet with the intent of implementing the program at all of its locations including the location in Miami, Florida. In Miami, it was implemented in May 2001. There is no dispute that the Company did not notify or offer to bargain with the Union prior to its implementation.

Roadnet is essentially an expert software program used as a tool to route vehicles within the geographic area where the customers are located. To solve the traveling salesman problem, a database is created containing, inter alia, the names and addresses of each customer and the times when customers accept deliveries. Essentially, it constructs a map showing the location of each customer, the distances from each other and the frequency of deliveries to each. Given the number of trucks available (both driven by company drivers and agency drivers) and inputting each day's scheduled deliveries, the program will give a preliminary solution each evening to the traveling salesman problem; that is, what trucks are to go where on the following day. This is essentially an information tool used by traffic people to set up each day's trip schedule and in a sense creates an objective body of information to supplement each trip planner's accumulated experience and intuition.

One consequence of the software program's implementation was to eliminate at least one nonunit job in the traffic department. Also, it allowed trips to be scheduled earlier in the day. Another consequence was that a number of the outlying routes could be consolidated so that the Company could use fewer nonunit agency drivers and trucks to make the same number of deliveries per day. The Company's employee drivers were normally assigned to more densely populated areas, which were closer to Goya's terminal.

Although less affected than agency drivers, it could be argued that the institution of the Roadnet program resulted in some change in the routes of the bargaining unit drivers. That is, as a result of increased efficiencies in trip planning, the number of deliveries, on average, that each driver made each day went up and that the amount of time spent on the road also went up. This resulted in both more equalization of pay amongst the employee-drivers and, on average, more money for them all.

The Company argues that Roadnet should be considered to be merely a tool, similar in nature to a decision to buy and use a new and more efficient type of drill press. The Company argues that Roadnet simply takes information already in existence (but inside the trip planners' heads), and constructs a map to more quickly and efficiently design the day's deliveries. In this respect, the Company contends that the use of Roadnet therefore was not a material change.

The Company also argues that the implementation of Roadnet, although concededly having the impact of reducing employment for nonunit employees, had little if any impact on employees within the bargaining unit. Indeed, the Company contends that if anything, the impact was favorable to the bargaining unit employees as a whole, inasmuch as the use of Roadnet equalized their work and resulted in higher income to the unit drivers in almost all cases.

The problem with the Company's argument is that the income of the employee-drivers was directly tied to the amount of deliveries each person makes each day. That is, they get commissions based on deliveries and so their wages are directly impacted by the amount of deliveries they are assigned to make. Thus, the mapping of delivery routes is directly related to the drivers' incomes simply because of the method by which they are paid. The implementation of Roadnet may have been beneficial to the employee drivers in terms of equalization of pay and even in increasing their pay because of the elimination of some agency drivers. But there is no question that the implementation of Roadnet, for better (higher income), or worse,

[2] Some customers, particularly bigger ones, accept deliveries only at specified times. Accordingly, the route must take this into account.

(longer hours), had a direct and substantial impact on bargaining unit employee wages and hours.[3]

One might argue whether the impact of the change was good or bad, or how big it was. But that is largely beside the point.[4] If a change in company practice or procedure has, as it does in this case, a direct and not immaterial affect on employee wages, hours and working conditions, then a company, having a bargaining relationship with a union, is required to bargain about the change. As this was not undertaken, it is my conclusion that the Company, in this respect, has violated Section 8(a)(5) of the Act.[5]

D. Unilateral Disbursement of Stores to Which Chavez Made Deliveries

The General Counsel contends that when the Company discharged Chavez it had an obligation to bargain with the Union about the reassignment of the stores on his route to the other drivers. (The Company did not hire a replacement.) I do not agree.

When a company fires an employee for cause, and assuming that the employee is doing work required by the enterprise, it has to either hire someone else or reassign his or her work to the remaining employees on staff. This does not, to my mind, constitute a unilateral change but simply a continuation of the normal course of doing business, inherent to any enterprise. To suggest that an enterprise must first bargain with a union about the immediate need to reassign that person's work every time it discharges someone, would be to impose a duty that would infringe upon and tend to impede the normal operations of any enterprise. For example, for how long would a company be required to bargain before reaching an impasse before it could hire a replacement or reassign required work to someone else?[6]

CONCLUSIONS OF LAW

1. Goya Foods of Florida is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Union of Needletrades, Industrial, and Textile Employees, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been the exclusive representative of certain employees of the Respondent in a unit appropriate for the purposes of collective bargaining, as described above, within the meaning of Section 9(a) of the Act.

4. By unilaterally changing driver routes and thereby changing their hours and wages at the Miami, Florida facility, the Respondent has violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I will not recommend that the Respondent eliminate the use of the Roadnet software program and return to its former way of making the daily routes. Such a remedy would, in my opinion, be burdensome and impose a degree of inefficiency in the Company's operations that I do not think is required by the nature of the violation found herein. Nor can I recommend that any backpay be paid to any of the employees in the bargaining unit, inasmuch as the evidence does not show that there was any monetary detriment to them as a consequence of the change.

On the other hand, it is my opinion, that the Respondent should bargain in good faith with the Union about the effects of this change and if agreement is reached embody such agreement in a written document.

[Recommended Order omitted from publication.]

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[3] It could be argued that one of the impacts that the Roadnet system had on the drivers was to eliminate any possibility of favoritism that might have been shown by dispatchers to particular drivers in the assignment of routes.

[4] The fact that a unilateral change may be favorable toward employees is of no consequence so long as it has an impact on bargaining unit employees. The issue is not whether the change is a grant of a benefit designed to influence employees as to whether to support a union, but rather whether the Company breached its obligation to bargain with a Union before making such changes. *NLRB v. Katz,* 369 U.S. 736 (1962), *NLRB v. Crompton-Highland Mills,* 337 U.S. 217 (1949).

[5] Unlike the situation involving the minimal delays caused by the implementation of the new verification procedure, the implementation of the Roadnet system had a dramatic impact on at least some of the drivers' incomes. This was shown by R. Exh. 7 which shows as follows:

NAME	*COMMISSIONS 6/4–10/1/00*	*COMMISSIONS 6/3–9/30/01*	*INCREASE/ DECREASE*
Eduardo Arhello	5258	6313	1055
Pablo Brito	4944	5721	777
Antonio Castro	2658	7321	4692
Isain Navarro	7962	8498	536
Reinol Orta	4584	4944	360
Alfredo Reyes	3941	4694	752
Antonio Rodriguez	5042	6933	1891
Vladmir Romero	6313	7850	1537
Miguel Then	5007	6468	1461
Orlando Torrens	4653	6106	1453
Juan Valdes	3981	4330	348
Pedro Varela	5132	5043	(89)
Llamil Yema	6195	6766	571

[6] This is not to suggest that a company would not be required to bargain about a grievance raised, after the fact even in the absence of a contractual grievance procedure, with respect to the discharge of an employee. When I say that Chavez was fired for cause, I do not mean to imply that the decision was for good or bad cause. What I mean is that his separation was not the result of economic considerations. Unlike a discharge prompted by an employee's conduct, the onset of economic factors that may cause a layoff are much more gradual and are therefore more amenable to prior notice and bargaining. In that situation, an employer and union may arrive at a number of solutions to an economic downturn in lieu of layoffs; for example, a reduction in hours for all employees.